Supreme Court, U.S.
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No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

JOHN L. GORTON, THOMAS HAUCH,
TIMOTHY HAUCH AND
MICHAEL VANDER LEEST,
PARTNERS UNDER THE NAME GORTON FARMS,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Seventh Amendment's guarantee of a jury trial in civil cases should be incorporated under the Fourteenth Amendment's Due Process Clause.

Whether a state, after granting a general right to a jury trial in civil cases, can deprive a defendant of that right without violating the Fourteenth Amendment's Due Process Clause.

Whether a state trial court judge can find that a defendant violated a state consumer protection statute, and based on such finding award attorney fees under that statute, without violating the Fourteenth Amendment's Due Process Clause, where a violation of the statute was not alleged prior to or during trial, where a jury trial already has been held, and where the jury has made no findings establishing a violation of the statute.

RULE 29.6 STATEMENT

Petitioner American Cyanamid Company is a wholly owned subsidiary of American Home Products Corporation. American Cyanamid Company has one nonwholly owned subsidiary: Immunex Corporation.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported as *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995), and is reproduced below in the Appendix to this Petition as Appendix ("App.") A at 1a. The transcript of the July 29, 1993 ruling of the Wisconsin Circuit Court (Racine County), Dennis

J. Barry, J., is reproduced below as App. B at 1b. The circuit court's Order Granting Attorneys Fees and for Amendment of Judgment, dated July 30, 1993, is reproduced below as App. C at 1c. The circuit court's Amended Judgment, dated July 30, 1993, is reproduced below as App. D at 1d.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered on June 26, 1995. On September 8, 1995, Petitioner filed a timely application to extend the time for filing a petition for a writ of certiorari through and including October 25, 1995 (Application No. A-238). Justice Stevens granted Petitioner's application on September 12, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the Constitution provides in pertinent part:

> In Suits at common law . . . the right of trial by jury shall be preserved. . . .

Section 1 of the Fourteenth Amendment of the Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Article I, Section 5 of the Wisconsin Constitution provides in pertinent part:

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law without

regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law.

Section 100.18 of the Wisconsin Statutes provides in pertinent part:

Fraudulent representations.

(1) No person, firm, corporation or association, or agent or employe thereof, with intent to sell . . . shall make . . . an advertisement, announcement, statement or representation of any kind . . . which . . . contains any assertion, representation or statement of fact which is untrue, deceptive or misleading. . . .

(11)(b)(2) Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees.

Section 802.09(2) of the Wisconsin Statutes provides in pertinent part:

Amendments to Conform to the Evidence. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to do so

amend does not affect the result of the trial of these issues.

Section 805.16(1) of the Wisconsin Statutes provides in pertinent part:

> Motions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions, briefs or other documents.

STATEMENT OF THE CASE

Respondents, who are Wisconsin farmers, filed suit against Petitioner American Cyanamid Company (hereinafter "Cyanamid") in the Circuit Court of Racine County, Wisconsin on February 8, 1990. The gravamen of their complaint was that their 1988 and 1989 rotational corn crops were injured by "soil carryover" from Scepter, a federally registered herbicide manufactured by Cyanamid. According to Respondents, they had applied Scepter to their soybean fields in 1987 and 1988, and then, in accordance with the rotational crop restrictions on Scepter's federally approved product labeling, waited at least eleven months before planting rotational corn in the same fields. Their complaint sought compensatory damages based on theories of breach of warranty, defective product, and negligent misrepresentation regarding Scepter's safety to rotational corn. On October 1, 1991, Respondents filed an amended complaint adding a punitive damages claim alleging that Cyanamid's conduct was willful and reckless. *See* App. A at 3a.

Prior to trial Cyanamid filed a motion to limit damages on the grounds that Scepter's label contained enforceable disclaimers and limitations on liability, and that Respondents' claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1994). The circuit court denied that motion, and a trial was held between August 14-22, 1992. The trial centered on the tests conducted by Cyanamid to determine a safe waiting period for planting rotational corn in soybean fields that had been treated with Scepter. There also was testimony on the promotional statements made by Cyanamid in connection with Scepter's safety to rotational corn planted in accordance with the labeling's eleven-month restriction. The jury was instructed as to negligence and strict liability only. App. A at 4a.

On August 28, 1992, the jury rendered a special verdict, finding that Cyanamid was "negligent regarding Scepter," that Cyanamid's conduct in connection with such negligence was "outrageous," but that Scepter was not "unreasonably dangerous" to Respondents' crops. The jury awarded Respondents $129,300 in compensatory damages. Because of the jury's finding of outrageous conduct, additional testimony was presented, resulting in a second special verdict on August 31, 1992, which assessed $50,000 in punitive damages. Judgment on the verdict was entered on February 4, 1993.[1] *See* App. A at 4a.

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[1] The circuit court's judgment also assessed Cyanamid double costs in the amount of $20,585.

Respondents' complaint contained no allegations regarding a violation of WIS. STAT. § 100.18 ("Fraudulent representations"), a state consumer protection statute which authorizes suits to recover "pecuniary loss ... including reasonable attorney fees" where a company makes "untrue, deceptive or misleading" sales or promotional representations. The subject of a § 100.18 violation never was raised during the trial. The jury received no instructions regarding § 100.18, and the jury was not requested to make, and did not make, any findings regarding a violation of § 100.18. App. A at 23a. Nor was the jury instructed on negligent misrepresentation, and neither of the jury's special verdicts contains a finding that Cyanamid made negligent (or fraudulent) representations regarding Scepter's safety to rotational corn.

On March 4, 1993, more than six months after the jury rendered its verdict, Respondents filed with the circuit court a "Petition for Hearing Regarding Attorney Fees." The petition asserted that Respondents were entitled to attorney fees under WIS. STAT. § 100.18 on the ground that "[i]n the course of discovery and during the trial of the case, evidence was obtained by the plaintiffs which showed that the defendant violated Section 100.18 of the Wisconsin Statutes and that plaintiffs were damaged by reason of the defendant's violation of that section." App. A at 23a-24a. Respondents requested the court to allow an amendment to their pleadings to include an allegation that Cyanamid had violated § 100.18, to hold a hearing to determine whether Cyanamid had violated § 100.18, and to

award attorney fees on the ground that Cyanamid had violated § 100.18. *Id.*

Cyanamid objected to Respondents' petition on two grounds: First, Cyanamid argued that the petition was untimely under WIS. STAT. § 805.16(1), which establishes a twenty-day period for filing motions after verdict. App. A at 25a. Second, Cyanamid argued that it would be improper for the circuit court judge to step into the already dismissed jury's shoes and find that Cyanamid had engaged in conduct that violated § 100.18. *See id.* at 27a-28a. As to the second point, Cyanamid contended that it was entitled to have a jury make findings pertinent to a § 100.18 violation. Cyanamid also contended that a post-verdict finding of a § 100.18 violation by the circuit court judge would be fundamentally unfair because Cyanamid had no notice during trial of any claim for a § 100.18 violation, and had neither expressly nor impliedly consented to trial of such a non-pleaded claim. In making this argument Cyanamid relied upon WIS. STAT. § 802.09(2), which allows non-pleaded claims to be tried only "by express or implied consent of the parties," and on *State v. Peterson*, 312 N.W.2d 784, 793 n.21 (Wis. 1981) ("[T]he procedures set forth in sec. 802.09 . . . *satisfy the requirements of due process.*") (emphasis added).

Hearings of argument on Respondents' petition were held on June 7, 1993 and July 29, 1993. Immediately following conclusion of argument the circuit court judge rendered an oral ruling holding that Cyanamid had violated § 100.18 and that Respondents were entitled to reasonable attorney fees as a result of that violation. *See* App. B. On July 30, 1993, the circuit court judge issued an

"Order Granting Attorney Fees and for Amendment of Judgment." *See* App. C. This order found that "the plaintiffs were damaged by reason of defendant's untrue, deceptive or misleading statements within the meaning of Section 100.18 Wis. Stats.," and awarded to Respondents their attorney fees for the entire suit in the amount of $307,421.25.[2] App. C at 2c. The circuit court also filed an Amended Judgment on July 30, 1993 to incorporate the attorney fee award. App. D at 1d.

On August 17, 1993 Cyanamid filed an appeal in the Court of Appeals of Wisconsin (District II) challenging the propriety of the circuit court judge's having awarded attorney fees based on his own, post-verdict determination that Cyanamid had violated § 100.18. That appeal was consolidated with Cyanamid's earlier appeal seeking review of the circuit court's denial of the pretrial FIFRA preemption motion. On or about August 25, 1994, the court of appeals, focusing only on the FIFRA preemption issue, certified this case to the Supreme Court of Wisconsin for its review and determination. App. A at 1a-2a. In the state supreme court proceeding Cyanamid again pressed its position that it was entitled to a jury determination on the facts underlying a violation of § 100.18, and that because of the lack of notice during trial, the circuit court judge's post-

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[2] The circuit court's order incorporated by reference its oral findings, which included a finding that retroactive amendment of the pleadings to allege a violation of § 100.18 was not necessary. *See* App. B at 5b; App. C at 1c.

verdict finding that Cyanamid had violated § 100.18 constituted a deprivation of due process. App. A at 25a-26a.

The Wisconsin Supreme Court's June 26, 1995 opinion affirmed the circuit court's award of attorney fees pursuant to § 100.18. App. A at 23a-29a.[3] The court found that Respondents' petition was verdict-related, not trial-related, and for that reason, not untimely under WIS. STAT. § 805.16(1). App. A at 26a. Furthermore, the court found that "this case clearly deals with . . . . exactly the type of allegations that fall within the purview of sec. 100.18(1)"; that Respondents' "negligent misrepresentation claim, as presented by the evidence at trial, entailed all of the elements of a claim brought pursuant to sec. 100.18(1)"; that "the jury, as well as the circuit court judge, heard all of the evidence that it needed to render a decision regarding the sec. 100.18 claim"; that Cyanamid "had ample opportunity to rebut the underlying allegations stemming from a sec. 100.18, STATS., claim, and in fact, presented substantial evidence at trial in an effort to rebut [Respondents'] assertions on this point"; and that "there is no dispute that the [§ 100.18] claim was fully aired at trial." App. A at 28a-29a. Moreover, citing *State v. Peterson*, 312 N.W.2d 784, the state supreme court found that "in asserting a claim for attorney fees

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[3] The opinion also affirmed the circuit court's finding that FIFRA did not preempt Respondents' claims. App. A at 5a-22a. Although Cyanamid strongly disagrees with the preemption holding, it is not seeking certiorari on that issue.

post-trial, American Cyanamid was in no way prejudiced" because "[t]here simply was no other evidence that could have been presented during trial to rebut a sec. 100.18 claim." App. A at 29a.

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES IMPORTANT QUESTIONS UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

Cyanamid contends that it was denied a jury trial on the question of whether it made untrue, deceptive, or misleading statements in violation of the Wisconsin consumer protection statute, WIS. STAT. § 100.18. Because the circuit court judge determined on his own, in the absence of any jury findings and almost a year after the jury was dismissed, that Cyanamid had violated and should be held liable for attorney fees under § 100.18, this case raises the question of whether the Seventh Amendment's guarantee of a jury trial in civil cases should be applied to the states through the Fourteenth Amendment's Due Process Clause. Alternatively, this case raises the question of whether a state's denial of a jury trial to a particular civil defendant, where the state has granted the right to a civil jury trial generally, represents a denial of due process under the Fourteenth Amendment. Furthermore, the lack of a jury determination on the facts underlying a violation of § 100.18, coupled with the failure of Respondents to claim a violation of § 100.18 until six months after the trial, raises the question of whether the process afforded Cyanamid was so fundamentally unfair as to constitute a denial of proce-

dural due process under the Fourteenth Amendment.

That Cyanamid was denied a jury trial is fundamental to the questions raised before this Court. Therefore, as a preliminary matter, it must be understood that Cyanamid was denied a jury trial because the circuit court judge found that Cyanamid violated § 100.18 without a jury first having made the necessary factual determinations underlying a § 100.18 violation.

Following the trial, the jury was neither asked to find, nor did it find, that Cyanamid made any negligent or untrue, deceptive, or misleading statement. Instead, the jury was given only three instructions as to negligence. The first concerned the duty of a manufacturer; the second, the duty of a manufacturer to warn; and the third, the duty of a manufacturer who undertakes to give instructions as to the use of a product. Given those instructions, the jury answered affirmatively in response to the generic questions of whether Cyanamid was negligent regarding Scepter, and whether Cyanamid's conduct was outrageous. It is clear from the verdict and the instructions upon which it was based, that the jury's finding of negligence could have been based on a wide range of possible conduct by Cyanamid. Similarly, the finding that the conduct that constituted negligence was outrageous does not equate to a finding that Cyanamid made untrue, misleading, or deceptive statements. A finding of "outrageous conduct" forms the basis for a punitive damages award, not liability under § 100.18. *See generally Loveridge v. Chartier*, 468 N.W.2d 146, 159 (Wis. 1991) (explaining that the Wisconsin courts use the term

"outrageous" as an "abbreviation" for the types of conduct which justify the imposition of punitive damages). In short, the jury did not find, nor was it asked to find, that Cyanamid made any untrue, deceptive, or misleading statement necessary to support a violation of § 100.18.

Although Cyanamid argued that it was improper for the circuit court judge to step into the jury's shoes and make the necessary findings to support a § 100.18 violation, the Wisconsin Supreme Court skirted this issue. The state supreme court referred casually to the "jury's finding that American Cyanamid made negligent misrepresentations" in a section of its opinion not even dealing with the consumer protection statute, as if the jury had made such a finding, *which it did not*. *See* App. A at 21a. As the state supreme court saw it:

> Gorton Farms' negligent misrepresentation claim, as presented by the evidence at trial, entailed all of the elements of a claim brought pursuant to sec. 100.18(1), STATS. Thus, the jury, as well as the circuit court judge, heard all of the evidence that it needed to render a decision regarding the sec. 100.18 claim. The jury returned a verdict that American Cyanamid was negligent and that its conduct was outrageous. . . .
>
> . . . American Cyanamid had ample opportunity to rebut the underlying allegations stemming from a sec. 100.18, STATS., claim, and in fact, presented substantial evidence at trial in

> an effort to rebut Gorton Farms' assertions on this point.

App. A at 28a-29a. Thus, the state supreme court essentially held that the necessary elements for a violation of § 100.18 were pleaded, and the jury heard enough evidence to support a verdict that petitioner violated the statute.[4]

The critical flaw in the Wisconsin Supreme Court's result-driven opinion is its failure to recognize that if a jury trial is to have any meaning at all, the jury must not only hear all the pertinent evidence on the factual issues underlying the alleged violation, but also must *actually decide* those issues. *See Hodges v. Easton*, 106 U.S. 408, 411 (1882) ("Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it.") (quoting *Barnes v. Williams*, 24 U.S. (11 Wheat.) 415, 416 (1826)). Indeed, given the state supreme court's assertion that Cyanamid presented "substantial evidence" to rebut Respondents' claims regarding a violation of § 100.18, the jury, had it

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[4] The Wisconsin Supreme Court stated that the elements of the common law tort of negligent misrepresentation entail all of the elements of a violation of § 100.18. App. A at 28a. Cyanamid does not challenge that interpretation of state law by the state supreme court. However, it entirely misses the point. It is clear that regardless of whether the elements of the tort of negligent misrepresentation are identical to those of § 100.18, the jury was never asked to find nor did it find that Cyanamid made a negligent misrepresentation.

been called upon to decide whether there had been any untrue, misleading, or deceptive statement (or a negligent misrepresentation), very well could have found in Cyanamid's favor. For these reasons, Cyanamid contends that it was denied a jury trial on the question of whether it violated § 100.18.

I. THIS COURT SHOULD DECIDE WHETHER PETITIONER IS GUARANTEED A RIGHT TO A CIVIL JURY TRIAL UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

Assuming Cyanamid was denied a jury trial, this case raises the question of whether Cyanamid had a right to a civil jury trial under the due process clause of the Fourteenth Amendment. As stated by this Court in *Duncan v. Louisiana*:

> The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.

391 U.S. 145, 147-48 (1968). The Court in *Duncan* went on to list specific rights under the First, Fourth, Fifth, and Sixth Amendments which had already been "incorporated" under the Due Process Clause of the Fourteenth Amendment, and ulti-

mately concluded that the right to a jury trial in a criminal case, as articulated in the Sixth Amendment, should be one of them. *Id.* at 148, 149-50. Although a jury trial was considered fundamental enough to the American scheme of justice to require states to provide a trial by jury in criminal cases as a matter of due process, no case has yet held that the Seventh Amendment right to a jury in civil cases is applicable to the states through the Fourteenth Amendment. *See Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (holding Seventh Amendment right to jury trial applicable to action brought in federal court under fair housing provisions of the Civil Rights Act of 1968, and acknowledging that the Court had not previously held the right to jury trial in civil cases to be an element of due process applicable to state courts through the Fourteenth Amendment, but expressing no view as to whether jury trials must be afforded in Civil Rights actions brought in the state courts).

To justify affording criminal and civil defendants different constitutional protection on this issue, a principled distinction would have to be drawn between the criminal and civil contexts with respect to the role a jury plays in our American scheme of justice. It is not clear from *Duncan* what critical role a jury plays in our system that requires criminal defendants be afforded a Fourteenth Amendment right to a jury trial but not civil defendants, although the possibility of such a distinction was alluded to by the Court. *See* 391 U.S. at 157.

The Court appears to view the role of a jury as essentially a buffer between defendants and the state. *Id.* at 156. Based on this reasoning, one could

argue that the justification for treating criminal trials differently than civil trials is simply that in a criminal case, the complaint against a defendant is brought and pursued by the state, while in a civil case the complaint is brought and pursued by a private party. In both cases, however, it is the state that presides over the proceedings in a decision-making capacity and ultimately enforces the judgment. The jury provides a buffer between the defendant and the state only to the extent that the jury limits the decision-making power of the state. Therefore, the argument that a jury trial is a constitutionally protected substantive right under the Fourteenth Amendment because the jury functions as an essential buffer between a criminal defendant and the state as decision-maker, holds up equally well in the civil context in which Cyanamid found itself before the Wisconsin courts. This is particularly true in this case, given the trial judge's quasi-punitive assessment of attorney fees against Cyanamid. In both contexts, the defendant is in the same position relative to the state decision-maker, and it is within this relationship that the jury is intended to function as a buffer. Because of this, Cyanamid asks this Court to declare that it has a federally guaranteed right to a jury trial under the Due Process Clause of the Fourteenth Amendment.[5]

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[5] Cyanamid is also prepared to argue that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the states, as argued in Justice Black's concurring opinion in *Duncan*, 391 U.S. at 163.

II. ALTERNATIVELY, THIS COURT SHOULD DECIDE WHETHER THE STATE OF WISCONSIN, AFTER GRANTING A GENERAL RIGHT TO A JURY TRIAL IN CIVIL CASES, CAN DEPRIVE PETITIONER OF THAT RIGHT WITHOUT VIOLATING THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

As an alternative ground for a federal right to a jury trial in this case, Cyanamid contends that because Wisconsin granted a right to a jury trial to all civil defendants (and plaintiffs) in its state courts, Cyanamid cannot be denied that right without violating the Due Process Clause of the Fourteenth Amendment.[6]

It is a well-established concept in due process jurisprudence that state law can provide the source of a federally protected interest under the Fourteenth

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[6] Cyanamid had a right to a jury trial under Article I, Section 5 of the Wisconsin Constitution ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy . . . ."). The Wisconsin Supreme Court's opinion in this case surely cannot be read to hold that the Wisconsin Constitution's right to a jury trial merely includes the right to have a jury *hear* all the pertinent evidence and not the right to have the jury decide the factual questions based on that evidence. A fairer reading of the opinion suggests that the state supreme court somehow simply missed the fundamental issue of whether Cyanamid was denied the right to a jury trial. Therefore, Cyanamid contends that it had a right under the Wisconsin Constitution to a jury determination on the facts underlying a § 100.18 violation—a right that the state supreme court failed to vindicate.

Amendment. Although a particular interest may not by its nature qualify as a federally protected interest, once the interest is determined to be grounded in state law, a long line of Supreme Court cases holds that the interest receives Fourteenth Amendment protection against arbitrary deprivation. *See, e.g.*, *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (holding that a claim of entitlement is decided by reference to state law); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (holding that a protected liberty interest can be statutory creation of the state); *Perry v. Sinderman*, 408 U.S. 593, 602 (1972) (holding that a protected interest can be created by a state's common law). This line of cases, however, deals with what procedural due process is to be afforded substantive interests created by a state. In the present case, Cyanamid is not merely asserting that the State gave it a protected interest in a jury trial and cannot take that away without notice and a hearing. Instead, Cyanamid also is claiming it had a substantive right, granted by the State of Wisconsin, which cannot be taken away at all.[7]

Thus, this case raises the question of whether the principle that a state can create a federally protected *interest* under the Fourteenth Amendment's Due Process Clause extends to state-created *substantive rights*. That issue was raised in the Eighth Circuit

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[7] The view that the right to a jury trial is a substantive right —a buffer between defendant and the state—and not just an element of procedural due process, is supported by the *Duncan* case, as discussed above.

in *Klimas v. Mabry*, 599 F.2d 842 (8th Cir. 1979), *rev'd on other grounds*, 448 U.S. 444 (1980). *Klimas* involved a sentencing procedure under the Arkansas Habitual Criminal Act. Although a jury is not federally required in criminal sentencing, the Arkansas statute gave the defendant that right. After the jury imposed a sentence under the statute, the defendant appealed to the Arkansas Supreme Court, which held that evidence of certain past crimes should not have been considered by the jury. The state supreme court, however, did not remand the case for a new jury determination, but instead reimposed sentence based on the admissible evidence the jury actually did hear. The court of appeals held that this constituted a denial to defendant of a trial by jury and "[w]here a right to trial by jury has been established under state law, the state cannot deny a particular accused that right without violating even the minimal standards of the [Fourteenth Amendment's] due process clause." 599 F.2d at 848.[8]

Cyanamid asks this Court to affirm the position taken by the Eighth Circuit and hold that

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[8] Although *Klimas* was reversed by this Court in *Mabry v. Klimas*, 448 U.S. 444 (1980), the Court did not say whether it agreed with the principle that once a state grants a substantive right to a jury trial it cannot thereafter deny a particular defendant that right without violating the Fourteenth Amendment's Due Process Clause. The Court instead reversed and remanded to the court of appeals because there remained an important issue for the state courts to decide regarding the construction of a subsequent amendment to the habitual offender statute, which could affect the defendant's rights.

Wisconsin's denial of Cyanamid's right to a jury trial on the factual issues underlying a § 100.18 violation constituted a denial of due process under the Fourteenth Amendment.

III. THIS COURT ALSO SHOULD DECIDE WHETHER THE CIRCUIT COURT JUDGE'S POST-VERDICT AWARD OF ATTORNEY FEES FOR VIOLATION OF WISCONSIN'S CONSUMER PROTECTION STATUTE DEPRIVED PETITIONER OF PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IN THAT A VIOLATION OF THE STATUTE WAS NOT ALLEGED PRIOR TO OR DURING TRIAL, AND THE JURY MADE NO FINDINGS ESTABLISHING A VIOLATION OF THE STATUTE

Cyanamid contends that even if it did not have a federally grounded right to a jury trial on the factual issues underlying a § 100.18 violation, the process afforded by the Wisconsin circuit court was nevertheless so deficient as to constitute a denial of procedural due process under the Fourteenth Amendment. Cyanamid clearly had a protectable property interest and an additional reputational interest at stake when it stood as a civil defendant in a state court, accused in a product liability suit of violating the consumer protection provisions of § 100.18. It also is clear that the Fourteenth Amendment required the State of Wisconsin to provide procedural due process to ensure that Cyanamid's interests were not unjustifiably taken away. The question raised by this case is whether the process afforded to Cyanamid complied with the

standard of fairness and accuracy required by the Fourteenth Amendment's Due Process Clause.

Cyanamid's claim that it was denied procedural due process centers around two interrelated issues. First and foremost, Cyanamid was not informed that it was being accused of violating § 100.18 until long after the trial on the issue of negligence was over. Cyanamid pressed this point before the Wisconsin Supreme Court by citing to WIS. STAT. § 802.09(2), which allows trial of nonpleaded claims only if they are tried by express or implied consent of all parties (i.e., only if procedural due process is afforded). App. A at 27a-28a. Cyanamid is not challenging the constitutionality of this statute, which embodies the need for procedural due process in state court proceedings. Rather, Cyanamid is challenging the state supreme court's ultimate conclusion that Cyanamid was in no way prejudiced by Respondent's post-verdict (i.e., nonpleaded) claim of a violation of § 100.18. App. A at 29a.

The Wisconsin Supreme Court essentially based its conclusion that Cyanamid was not prejudiced on the grounds that Respondents pleaded negligent misrepresentation, which the court held to contain the same elements as a violation of § 100.18, and that Cyanamid presented substantial evidence on the issue of negligent misrepresentation at trial. App. A at 28a-29a. Although Respondents included as one of their claims an allegation that Cyanamid made negligent misrepresentations concerning Scepter, the majority of the evidence on Cyanamid's alleged negligence centered on the testing of Scepter. Even if substantial evidence was presented on the issue of negligent misrepresentation, the claim actu-

ally submitted to the jury for special verdict was simply that of Cyanamid's negligence, a finding which does not necessarily encompass misrepresentation. Had Respondents pleaded a violation of § 100.18 before or even during trial, Cyanamid would have been on notice that the issue of whether Cyanamid made untrue, deceptive or misleading statements was an essential element of their claim. In other words, Cyanamid was not apprised of the full significance of Respondents' assertion that Cyanamid made negligent misrepresentations until after trial, when it was too late to focus its energies on the defense of that assertion.

In addition to the lack of adequate notice afforded Cyanamid on Respondents' § 100.18 claim, Cyanamid was also denied a jury determination on the factual issues underlying Respondents' § 100.18 claim. The question the lack of a jury determination raises, apart from those raised above concerning the right to a jury trial, is whether a jury should be viewed as a necessary element in a fair proceeding (in the absence of a waiver). If a jury can be viewed as a mechanism for rendering a process fairer or more accurate, then the lack of a jury indicates a deficiency in the process afforded a defendant.

Given the lack of a jury determination on essential factual issues underlying a violation of § 100.18, and also the delay in providing notice of such a claim until after the trial was over, Cyanamid asks this Court to determine whether the process afforded Cyanamid in this case by the courts of Wisconsin is constitutionally deficient under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

No.: 93-0778 and 93-2267

STATE OF WISCONSIN : IN SUPREME COURT

John L. Gorton,
Thomas Hauch,
Timothy Hauch and
Michael Vander Leest, partners under the name
Gorton Farms,
a Wisconsin general partnership,

Plaintiffs-Respondents,

v.

American Cyanamid Company,
a Maine corporation,

Defendant-Appellant.

APPEAL from an order of the circuit court for Racine County, Dennis J. Barry. *Affirmed.*

WILCOX, J. This case is on certification from the court of appeals following a jury trial held in the circuit court for Racine County, Honorable Dennis J. Barry, Judge. The jury concluded that Gorton Farms Inc. was entitled to damages for harm to its corn crops caused through the negligence of American Cyanamid Company (American Cyanamid). The issue certified for our consideration is as follows:

> Whether, in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. sec. 136v(b), preempts Wisconsin common law damage claims of breach of warranty, failure to warn and misrepresentation brought against a chemical manufacturer of a herbicide registered with the Environmental Protection Agency (EPA)?

In resolving this issue, we also consider a separate issue of whether attorney fees granted to Gorton Farms by the circuit court pursuant to sec. 100.18, STATS., were appropriate. We conclude that the circuit court properly determined that Gorton Farms' claim as to negligent misrepresentation is not preempted by FIFRA and that Gorton Farms is entitled to attorney fees pursuant to sec. 100.18. Therefore, we affirm the decision of the circuit court.

During the 1980's, American Cyanamid developed an herbicide known as SCEPTER.[1] The herbicide is designed to control weeds in soybean crops. SCEPTER was first sold for use in Wisconsin in 1987. SCEPTER has been marketed through American Cyanamid sales personnel and technical

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1 Herbicides fall within FIFRA's definition of "pesticide" and, therefore, are within the purview of the federal statute. *See* 7 U.S.C. sec. 136(u) (1988). Accordingly, any reference to pesticide in this opinion will necessarily include an herbicide such as SCEPTER.

representatives, and is sold by agricultural dealers chosen by American Cyanamid.

In May of 1987 and 1988, Gorton Farms bought SCEPTER for their soybean fields. Gorton Farms purchased SCEPTER from the Delong Company, an authorized American Cyanamid agricultural dealer. SCEPTER was preplant incorporated on several fields by Gorton Farms in both 1987 and 1988. There is no dispute that the herbicide provided excellent weed control for the soybean plants.

In the spring of 1988, Gorton Farms planted field corn as a follow crop to the soybeans. Thus, the corn was planted into fields that had eleven months earlier been sprayed with SCEPTER. In June, 1988, there was evidence that the field corn was not growing properly. Gorton Farms asked Ronald Doersch of the University of Wisconsin Agronomy Department to examine the fields. Doersch indicated that the corn could have been adversely affected by the previous application of SCEPTER.

On February 9, 1990, Gorton Farms filed a complaint against American Cyanamid alleging theories of breach of warranty, defective product based on failure to provide adequate instructions for use, and negligent misrepresentation concerning SCEPTER's use in follow corn crops. In September, Gorton Farms amended its complaint to allege outrageous conduct in that American Cyanamid misrepresented SCEPTER as safe for "follow corn" despite having evidence of adverse carryover to corn from its field tests.

In November, 1991, American Cyanamid filed a "Motion For An Order Limiting Damages."

American Cyanamid argued that: (1) SCEPTER's label contained enforceable disclaimers and limitations on liability; and (2) FIFRA expressly prohibits states from imposing additional or different labeling requirements and, therefore, preempts state common law tort claims based on a failure to adequately warn. The circuit court ruled that the disclaimers did not limit American Cyanamid's liability and that FIFRA did not preempt Gorton Farms' state common law tort claims. The court stated: "It is this Court's opinion that the defendant has failed to demonstrate the clear purpose of Congress to have FIFRA supersede the police powers of the state of Wisconsin in this matter. Therefore, that portion of the defendant's motion to limit damages which is based on the doctrine of federal preemption is denied."

The case subsequently proceeded to a jury trial beginning in August, 1992. Following several weeks of trial, the jury was given a number of instructions as to negligence and strict liability. The jury found that American Cyanamid was "negligent regarding SCEPTER," that SCEPTER was not unreasonably dangerous to Gorton Farms' follow corn crops, that Gorton Farms was not negligent, and that American Cyanamid's conduct was outrageous. The jury awarded Gorton Farms compensatory damages in the sum of $129,300.00 and punitive damages in the sum of $50,000.00. Judgment on the verdict was entered on February 4, 1993. American Cyanamid filed a Notice of Appeal on March 22, 1993.

On March 4, 1993, Gorton Farms filed a motion in the circuit court requesting an award of attorney fees pursuant to sec. 100.18(11)(b)2, Stats. Following briefing and several oral hearings on the

matter, the circuit court concluded that an award of attorney fees was appropriate and granted fees in the sum of $307,421.25. An amended judgment was entered on July 30, 1993. A Notice of Appeal from the amended judgment was filed on August 18, 1993. The court of appeals granted a motion by American Cyanamid to consolidate the two appeals. Following briefing to the court of appeals, that court certified the above question to this court. We accepted jurisdiction of the entire matter on September 20, 1994. Further facts necessary for a resolution of the case are set forth below.

I. Preemption under FIFRA

The threshold issue on review is whether the circuit court properly concluded that FIFRA does not preempt Gorton Farms' state common law tort claims. American Cyanamid asserts that all of Gorton Farms' claims are predicated on a theory of failure to warn and, as such, are preempted by sec. 136v(b) of FIFRA. Gorton Farms responds that "FIFRA does not preempt common law damage liability based on negligent and outrageous conduct and testing and in misrepresenting SCEPTER's safety to follow corn, which conduct was part of [American Cyanamid's] marketing and sales activity and not based on SCEPTER's labeling or packaging."[2]

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[2] As an initial matter, we note that the record in this case does not contain a complete transcript of the trial evidence and proceedings. "When [an appellate] court does not receive a complete transcript, we assume that any fact necessary to

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Federal preemption of state law implicates issues of governmental authority that go to the very heart of our federal system. The potential for conflict between federal enactments and state law is a persistent reminder of the tensions inherent in our governmental structure. Although the federal Constitution envisions a substantial role for state governments, it also commands that federal law "shall be the supreme law of the land." U.S. CONST. art. VI, cl. 2.[3] Further, while states are

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sustain the trial judge's exercise of discretion is supported by the record." *Haack v. Haack*, 149 Wis.2d 243, 247, 440 N.W.2d 794, 796 (1989) (citing *D.L. v. Huebner*, 110 Wis.2d 581, 597, 329 N.W.2d 890, 897 (1983)); *see also Suburban State Bank v. Squires*, 145 Wis.2d 445, 451, 427 N.W.2d 393, 396 (1988). Moreover, this court has explained that the scope of review is necessarily confined to the record before the court when an appeal is brought on a partial transcript. *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979). Even absent a complete transcript, however, this court can consider errors of law in circuit court memoranda.

[3] The complete text of the Supremacy Clause of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

treasured for their roles as "laborator[ies] . . . [to] try novel social and economic experiments," *see New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 387, 76 L.Ed. 747 (1932), there is also the recognition of the importance of national control and uniformity.

Recently, preemption principles have been the center of many hard-fought legal battles involving important societal issues. Examples of these disputes range from challenges as to the validity of state statutes designed to limit corporate takeovers, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987), to challenges as to whether a state statute requiring payment of surcharges based on the status of the underlying insurance provider is preempted by ERISA, *New York Conference of Blue Cross Plans v. Travelers Ins. Co.*, — U.S. ——, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). An interesting example of the controversy surrounding the use of federal preemption is an executive order promulgated by former President Ronald Reagan in 1987 designed to dissuade executive departments and agencies from interpreting federal statutes in ways that would displace state law.[4]

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[4] *See* Exec.Order No. 12,612 (1987), reprinted in 5 U.S.C. sec. 601 app. 478 (1988). In pertinent part, the Order states:

> (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, A Federal statute to preempt State law only when the statute contains an express preemption provision or there is some

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When considering the federal preemption doctrine an important benchmark is a definition of both federal and state law. Obviously, federal law includes the United States Constitution and all of the federal statutes and treaties promulgated by Congress. Federal law also includes federal regulations promulgated by the various federal agencies. In *Fidelity Federal Savings and Loan Assoc. v. de la*

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other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law, Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982), the Supreme Court stated that "federal regulations have no less pre-emptive [sic] effect than federal statutes." Thus, federal law is broadly defined and includes regulations made by federal agencies under their congressionally granted authority.

On the state side, it is apparent that state constitutions, state statutes, and state regulations will all be encompassed within the definition of "state law." Also falling within the heading of state law, and of great importance to the issue at hand, is the concept of state common law tort actions. As noted by one commentator, "[t]he regulatory effect of tort law has long been recognized." *Penning Parker Landen, Federal Preemption and the Drug Industry: Can Courts Co-Regulate?*, 43 FOOD DRUG COSM. L.J. 85, 86 (1988). Further, In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 780-81, 3 L.Ed.2d 775 (1959), the Supreme Court stated that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing and controlling policy." Accordingly, the Court held that federal preemption of state action may occur where that action seeks "to redress private wrongs or grant compensation for past harm." *Id.*

Federal preemption may occur under several different scenarios. Express preemption occurs where Congress has seen fit to speak directly to the pre

emptive effect of a particular statute. The major question in cases arising under this scenario is the scope of the express preemption provision.[5] The more typical preemption case involves a statute that is either silent, or at least ambiguous, with respect to its preemptive effect. Where a statute is silent or ambiguous, courts generally have required clear evidence of legislative intent to preempt state law. For example, in *Hillsborough County, Fla., v. Automated Medical La., Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed.2d 714 (1985), the Court noted that there is a basic "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Courts have, however, on

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[5] A frequently cited case for this type of preemption is *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). In *Jones*, the Court considered a conflict between the California Business and Professions Code and the Federal Meat Inspection Act (FMIA) on measuring certain packaged meats. The state statute in question required that every package of bacon, at the time of the sale, weigh an amount equal to or greater than the weight stated on the package. The state law allowed for variations caused by the manufacturing process, but did not allow for deviations from stated weights due to moisture loss during distribution. FMIA, on the other hand, allowed for reasonable variations due to moisture loss. More importantly, the federal act contained a provision prohibiting the imposition of "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under" FIMA. *Id.* at 530, 97 S.Ct. at 1312. The Court found this language to present a clear expression of legislative intent and concluded that the state law was preempted. *Id.* at 530-31, 97 S.Ct. at 1312-13.

occasion determined that a congressional enactment impliedly preempts state law. This implied preemption is most often separated into three categories: occupation of the field preemption, obstacle preemption, and administrative preemption. *See Jose L. Fernandez, Dynamic Statutory Interpretation: Occupational Safety and Health Act Preemption and State Environmental Regulation*, 22 FLA. ST. U.L. REV. 75, 81-86 (1994).

Turning to the statute at hand, FIFRA was originally enacted in 1947 as a pesticide licensing and labeling statute and "was designed to work in harmony with the uniform state insecticide, fungicide and rodenticide act which was adopted in many States." S. REP. NO. 838, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3999. In 1972, the Act was amended such that FIFRA was transformed from a labeling law into a comprehensive regulatory statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991, 104 S.Ct. 2862, 2866-67, 81 L.Ed.2d 815 (1984). As noted by the Supreme Court: "As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority." *Id.* at 991-92, 104 S.Ct. at 2867.

Within FIFRA, Congress provided a detailed scheme for regulating the content of a pesticide's label. All pesticides sold in the United States must be registered for use by the EPA. 7 U.S.C. sec. 136a(a). The EPA has promulgated specific labeling requirements governing the scope, content, wording, and

format of pesticide labeling. *See* 40 C.F.R. sec. 156 (1992). While the manufacturer designs and formulates the content of the label, it must file with the EPA a statement which includes "the name of the pesticide," "a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use;" and a full description of the tests made and the results thereof upon which the claims are based. 7 U.S.C. sec. 136a(c)(1)(B)-(D).[6]

FIFRA also contains a section relating to state's rights in relation to the statute. Section 136v of FIFRA, titled "Authority of States," provides:

> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labelling or packaging in addition to or different from those required under this Act.

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[6] There is no dispute that at all times pertinent to this suit, SCEPTER was registered and labeled pursuant to FIFRA's requirements.

A plain reading of this provision reveals sec. 136v(a) expressly prohibits a state from permitting a sale or use of a pesticide that is prohibited by FIFRA, and sec. 136v(b) expressly prohibits any state labeling requirement "in addition to or different from" that imposed by FIFRA. However, in considering whether Congress intended to occupy the entire field of pesticide regulation through sec. 136v, we find no language to that effect, nor does the legislative history of the statute suggest it. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 609-10 & n. 4, 111 S.Ct. 2476, 2483-84 & n. 4, 115 L.Ed.2d 532 (1991). As noted by the Supreme Court:

> While the 1972 amendments turned FIFRA into a "comprehensive regulatory statute," the resulting scheme was not "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." To the contrary, the statute leaves ample room for States and localities to supplement federal efforts even absent the express regulatory authorization of sec. 136v(a) . . . . FIFRA . . . leaves substantial portions of the field vacant . . . .

Id. at 613, 111 S.Ct. at 2486 (citations omitted).

For more guidance on the preemption issue, both parties direct this court to *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). *Cipollone* involved similar preemption provisions relating to the federal statutes governing cigarette labeling and advertising. *Id.* at 514-15, 112 S.Ct. at 2616-17. The Court concluded that sec. 5(b) of the Public Health Cigarette Smoking

Act of 1969 preempted the plaintiff's state law tort claims based on the defendant's failure to warn of the hazards of cigarette smoking. *Id.* at 523, 112 S.Ct. at 2621.[7] The Court cautioned, however, that sec. 5 did not preempt all common law. For example, the Court stated that although the statute preempted state labeling requirements, it did not preempt state law obligations to avoid marketing a product with a manufacturing defect or with a design defect. *Id.* The Court then set forth its test to determine whether preemption was appropriate for plaintiff's common law claims:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of sec. 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact preempted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or pro-

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7 Section 5 of the 1969 Act, captioned "Preemption," provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. sec. 1334(b).

> motion," giving that clause a fair but narrow reading.

Id. Thus, the teaching of *Cipollone* is that courts must compare the particular language of a statute's preemption provision with each common law claim asserted to determine whether the common law claim is in fact preempted. Further, only if "the legal duty that is the predicate of the common law damages action constitutes" a requirement for labeling or packaging that is in addition to or different from those required by FIFRA will the asserted claims be preempted.

In the present case, Gorton Farms brought claims based on defective product, breach of warranty, and negligent misrepresentation. There is no dispute that each claim is a viable action under Wisconsin state law. American Cyanamid, however, asserts that each of these claims is derivative to the labeling and packaging of SCEPTER and, therefore, should be preempted by FIFRA. Gorton Farms counters that its proof at trial never touched on or attacked SCEPTER's labeling or packaging; rather, it centered on American Cyanamid's field tests, lack of scientific testing, and false and misleading statements in the promotion of SCEPTER.

In its amended complaint, under the heading of "CLAIM II," Gorton Farms alleges the following:

> 13. SCEPTER as labeled for use in Wisconsin is a defective product since its application interferes with the normal crop rotation and causes a loss in crop yield.

14. American Cyanamid Company failed to adequately warn Gorton Farms of the dangerous nature of the product and provided defective instructions for use.

15. As a result of American Cyanamid Company's manufacture and sale of this defective product and its defective warnings and instructions in use Gorton Farms suffered pecuniary losses in its corn yield in 1988 and 1989.

These allegations provide two distinct claims: (1) strict liability—defective design or manufacture, and (2) strict liability—failure to warn.[8] In the special

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[8] We note that those courts that have considered the issue have found the distinction in claims to be critical: (1) claims of strict liability based on design or manufacture defect are not preempted by FIFRA, *see Cipollone*, 505 U.S. at 523, 112 S.Ct. at 2621 (noting that similar preemptive provision of Public Health Cigarette Smoking Act of 1969 does not preempt claims based on manufacturing defects); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir.1993) (claims relating to testing, manufacturing, and formulating are not preempted); *Helms v. Sporicidin International*, 871 F.Supp. 837, 843 (E.D.N.C.1994) (claims based on defect in product are not preempted); *Higgins v. Monsanto*, 862 F.Supp. 751, 759 (N.D.N.Y.1994) (claims of strict liability based on design defect survive FIFRA preemption); *Jillson v. Vermont Log Buildings, Inc.*, 857 F.Supp. 985, 991 (D.Mass.1994) (claims regarding design and manufacture are not preempted by FIFRA); *Kennan v. Dow Chemical Co.*, 717 F.Supp. 799, 804-05 (M.D.Fla.1989); *Fisher v. Chevron Chemical Co.*, 716 F.Supp. 1283, 1288 (W.D.Mo.1989); whereas (2) claims of strict liability based on inadequate labeling are preempted by FIFRA, *see Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir.1993) (strict liability claim based on failure to warn against combining regulated products

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verdict, the jury was simply asked whether SCEPTER was unreasonably dangerous to Gorton Farms' follow corn crops. The jury answered the question "No." Gorton Farms did not cross-appeal from this finding, and, therefore, the issue of preemption of Gorton Farms' strict liability claim under FIFRA is not properly before this court.

In its amended complaint, Gorton Farms also alleges a breach of warranty claim. It appears, however, that this cause of action was abandoned at trial because the special verdict makes no reference to American Cyanamid's having breached a warranty, whether express or implied. Consequently, we do not consider whether a breach of warranty claim is preempted under FIFRA.

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preempted by FIFRA); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir.1993) (strict liability claim that product unreasonably dangerous due to failure to provide inadequate labeling preempted by FIFRA); *King v. E.I. Dupont De Nemours & Co.*, 996 F.2d 1346 (1st Cir.1993) (strict liability claim alleging unreasonably and defectively dangerous product due to a failure to warn preempted by FIFRA); *Trinity Mountain Seed Co. v. MSD Agvet*, 844 F.Supp. 597 (D.Idaho 1994) (strict liability claim preempted by FIFRA because based on pesticide label language); *Kinser v. Ciba-Geigy Corp.*, 837 F.Supp. 217 (W.D.Ky.1993) (strict liability claim alleging unreasonably dangerous product due to failure to warn preempted by FIFRA.)

Gorton Farms' third and final cause of action asserts a claim for negligent misrepresentation:

> 17. American Cyanamid Company formulated or manufactured and sold its product known as SCEPTER and negligently held out and represented to Wisconsin Farmers that the product was a safe and effective means of controlling weeds in soybean crops . . . without harm to subsequent crops.
>
> 18. As a result of such negligence, the use of this product by Gorton Farms, Gorton Farms suffered reduction in yield of corn in 1988 and 1989.
>
> . . . .
>
> 19. The foregoing conduct of the defendant's agents or employees were willful and in reckless disregard of the plaintiffs' rights and such conduct proximately caused the plaintiffs' actual damages.

The elements of a claim for negligent misrepresentation in Wisconsin are: (1) a duty of care or voluntary assumption of a duty on the part of the defendant; (2) a breach of that duty, i.e., failure to exercise ordinary care in making the representation or in ascertaining the facts; (3) a causal link between the conduct and the injury; and (4) actual loss or damage as a result of the injury. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 319, 401 N.W.2d 816, 822 (1987).

In *Cipollone*, the petitioner alleged two theories of misrepresentation. First, petitioner argued that the respondents, through its advertising, "neutralized the effect of federally mandated warn-

ing labels." *Cipollone*, 505 U.S. at 527, 112 S.Ct. at 2623. The Court noted that this claim was predicated on a state-law prohibition against statements downplaying the effects of smoking. *Id.* The Court concluded that because this claim "is merely the converse of a state law requirement that warnings be included in advertising and promotional materials," it is prohibited by sec. 5(b) of the 1969 Act which preempts both requirements and prohibitions. *Id.* Second, petitioner alleged fraud and misrepresentation both by " 'false representation of a material fact [and by] conceal[ment of] a material fact.' " *Id.* (citing trial transcript). The Court noted that the state law duty of such a claim—not making false statements of material fact or concealing such facts—was not the sort of requirement or prohibition proscribed by sec. 5(b). *Id.* The Court explained:

> State law prohibitions on false statements of material fact do not create "diverse, nonuniform, and confusing" standards. Unlike state law obligations concerning the warning necessary to render a product "reasonably safe," state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements. Accordingly, petitioner's claim based on allegedly fraudulent statements made in respondents' advertisements are not preempted by sec. 5(b) of the 1969 Act.

Id. at 529, 112 S.Ct. at 2624.

We follow the *Cipollone* reasoning on this point and hold that Gorton Farms' claim based on misrepresentation survives preemption under FIFRA.[9] We see nothing in FIFRA that seeks to overturn the longstanding rules governing misrepresentation. On the contrary, FIFRA simply seeks uniformity in labeling and packaging and mandates that states shall not impose labeling or packaging requirements other than those prescribed by the statute itself. Further, our reading of sec. 136v(b) leads us to conclude that its preemptive effect does not encompass the general duty not to make false statements. Quite simply, claims based on misrepresentations of fact do not challenge the labeling of a manufacturer's product.

Here, Gorton Farms presented evidence that American Cyanamid made representations that SCEPTER was safe to follow corn. These representations were made through written product such as promotional materials, advertisements, technical reports, as well through oral statements made by American Cyanamid's technical service representa-

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[9] We note that the *Cipollone* decision in regard to the portion concerning a claim for misrepresentation was part of the plurality joined by Chief Justice Rehnquist and Justices White, Stevens, and O'Connor. *Cipollone*, 505 U.S. at 528-29, 112 S.Ct. at 2623-24. However, Justice Blackmun, with whom Justices Kennedy and Souter joined, agreed with that part of the judgment determining that one of plaintiff's misrepresentation claims was not preempted under FIFRA. *Id.* at 539-42, 112 S.Ct. at 2629-31. Thus, seven justices reached the ultimate conclusion that one of plaintiff's state law misrepresentation claims was not preempted by federal law.

tives. All of the statements assuring that SCEPTER was "safe" and "extremely safe" had no relation to the labeling or packaging of the herbicide. Gorton Farms also presented evidence that American Cyanamid internal documents unequivocally showed that SCEPTER caused damage to follow corn crops in a variety of circumstances and yet, the company failed to disclose any information other than assertions that SCEPTER was safe to follow corn. As noted by Gorton Farms in its brief to this court: "Having heard rumors of SCEPTER carry over to follow corn in the fall of 1987, John Gorton asked an [American Cyanamid] technical service representative about it in February 1988, and [American Cyanamid's] representative assured him it was safe to plant corn following soybeans treated with SCEPTER. Thereafter, Gorton Farms again purchased SCEPTER for use in 1988."

We conclude that not only does the Gorton Farms' misrepresentation claim survive preemption under FIFRA, the evidence adduced at trial was credible and sufficient to sustain the jury's finding that American Cyanamid made negligent misrepresentations of facts as to the safety of SCEPTER and that this conduct was outrageous. As this court previously has noted, the proper test to be applied in determining whether a jury's answer should be sustained is whether there is any credible evidence to support the jury's answer. *Giese v. Montgomery Ward, Inc.*, 111 Wis.2d 392, 408, 331 N.W.2d 585, 593 (1983); *D'Huyvetter v. A.O. Smith Harvestore Products*, 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct.App.1991). "There is credible evidence which, when reasonably viewed, fairly admits an inference

supporting the jury's findings. That being true, neither the trial court nor this court has authority to change the jury's findings." *Giese*, 111 Wis.2d at 408, 331 N.W.2d at 593. Where, as here, the jury verdict has the approval of the circuit court, the scope of review is even more limited. *See Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984). Our review of the evidence adduced at trial leads us to conclude that there is credible evidence to support the jury's findings. Gorton Farms presented evidence that: American Cyanamid voluntarily assumed a duty; breached that duty by failing to exercise ordinary care in making the representations concerning SCEPTER; that the injury was caused by the conduct of American Cyanamid; and, that Gorton Farms sustained actual loss and damage as a result of the injury to its follow corn crops.[10]

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[10] In its brief to both the court of appeals and the supreme court, American Cyanamid presents an argument that even granting that FIFRA does not preempt all of Gorton Farms' claims, "[t]he economic loss doctrine precludes the respondents from recovering damages based upon their tort claims." This issue was not raised before the circuit court either at trial or in a motion after verdict. The court of appeals in its certification memorandum did not consider the issue. We conclude that because American Cyanamid failed to properly raise the issue at the circuit court level, it has waived the right for consideration of the issue by this court. *See Allen v. Allen*, 78 Wis.2d 263, 270-71, 254 N.W.2d 244, 248 (1977) (supreme court generally does not review an issue raised for the first time on appeal).

II. Attorney Fees

Following trial, counsel for Gorton Farms filed a petition requesting an award of attorney fees pursuant to sec. 100.18, STATS.—"Fraudulent representations." In short, sec. 100.18 provides that no person or corporation may advertise, announce or make a statement that "contains any assertion, representation or statement of fact which is untrue, deceptive or misleading." As relevant here, Gorton Farms sought attorney fees under sec. 100.18(11)(b)2, STATS., which states: "Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees."

The facts surrounding the issue of attorney fees are not in dispute. Gorton Farms filed their original complaint on February 8, 1990. They subsequently amended their complaint twice prior to trial. These documents did not contain an allegation that American Cyanamid had violated sec. 100.18, STATS. During trial, counsel did not present a specific allegation concerning a violation of sec. 100.18. Further, no jury instruction was requested concerning this statutory cause of action.

Following the jury verdict, on February 3, 1994, Gorton Farms moved for judgment on the verdict pursuant to sec. 805.14(5), STATS. On March 4, 1993, counsel for Gorton Farms filed a document titled "Petition For Hearing Regarding Attorney Fees." The document asserted that "[i]n the course of discovery and during the trial of the case, evidence

was obtained by the plaintiffs which showed that the defendant violated Section 100.18 of the Wisconsin Statutes and that plaintiffs were damaged by reason of the defendant's violation of that section." Counsel then requested that Gorton Farms be allowed to amend their pleadings to assert a claim that American Cyanamid violated sec. 100.18. Counsel, citing *John v. John*, 153 Wis.2d 343, 450 N.W.2d 795 (Ct.App.1989), *cert. denied*, 498 U.S. 814, 111 S.Ct. 53, 112 L.Ed.2d 28 (1990), asserted in the alternative that the pleadings would not necessarily have to be amended because a prayer for relief is not a substantive part of the complaint.[11]

The parties filed briefs on the matter and hearings before the circuit court were held on June 7, 1993, and July 29, 1993. The court granted the petition and signed an "Order Granting Attorney Fees and for Amendment of Judgment" which states in relevant part: "After hearing the parties, the Court stated its decisions and the reasons for its decisions orally on the record wherein it found that the plaintiffs were damaged by reason of defendant's untrue, deceptive or misleading statements within the meaning of Section 100.18 Wis.Stats."

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[11] In *John*, the court of appeals determined that an amendment of the pleadings in the case was unnecessary because "[t]he only post-trial change consisted of an additional form of relief," and "[a] prayer for relief is not a substantive part of the complaint." *John*, 153 Wis.2d at 367, 450 N.W.2d at 806.

On appeal, American Cyanamid present two arguments relating to this issue:

> 1. "The trial court lacked competence to rule on a petition for attorney fees pursuant to sec. 100.18(11)(b)2, STATS. filed more than six months after the verdict was rendered," and;
>
> 2. "The trial court erred in failing to apply sec. 802.09(2), STATS. to plaintiffs petition for attorney fees."[12]

Both of these issues are framed in a manner that suggests an attack on the procedural aspects of the case rather than the substantive concern of whether attorney fees are appropriate under the present circumstances. The second issue, however, does entail, to some extent, a consideration of the substantive concerns. We will address each issue in turn.

American Cyanamid first asserts that the trial court lacked competence because Gorton Farms did not follow proper rules of civil procedure pursuant to sec. 805.16, STATS. Section 805.16(1), STATS., provides that "[m]otions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by order specifying the dates for filing motions, briefs or other documents."

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[12] As an initial matter, we note that American Cyanamid did not take issue on appeal with the reasonableness of the attorney fees as awarded by the circuit court. Thus, we pass no judgment as to the reasonableness of the amount awarded.

Further, sec. 805.16(3), STATS., states that "[i]f within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record . . . the motion is considered denied and judgment shall be entered on the verdict."

Here, there is no dispute that more than 20 days elapsed before counsel filed the request for attorney fees. Further, the circuit court ruling awarding attorney fees was entered more than 90 days after the entry of the verdict. These facts, however do not mandate the conclusion that the circuit court was without authority to act in awarding attorney fees.

First, sec. 805.16 contemplates trial-related motions—new trial, evidentiary considerations, etc. A petition for attorney fees, on the other hand, is not trial-related; rather, it is verdict-related as it is predicated on a party's prevailing party status. Second, case law indicates that an award of attorney fees may be considered after entry of a judgment or order. For instance, in *ACLU v. Thompson*, 155 Wis.2d 442, 446, 455 N.W.2d 268, 270 (Ct.App.1990), the court concluded that a trial court could postpone an award of attorney fees in a civil rights action brought under 42 U.S.C. sec. 1983 without depriving its order or judgment on the merits of finality and appealability. The court reached this conclusion by noting that making an award prior to a final judgment being entered is unnecessary because the fee determination is separate from the underlying action. *Id.* at 446, 455 N.W.2d at 270. Further, in *Richland School Dist. v. DILHR*, 166 Wis.2d 262, 285-86, 479 N.W.2d 579, 589 (Ct.App.1991), aff'd 174 Wis.2d 878, 498 N.W.2d 826 (1993), the court held that the time limit on the request for statutory at-

torney fees to the trial court "is a reasonable time after the court enters a final order or judgment on the merits favorable to the requester. Only then will the requester know that the litigation has terminated and that the requester has prevailed." In *Richland School Dist.*, the request for attorney fees came 41 days after the trial court rendered its decision. *Id.* at 287 n. 7, 479 N.W.2d at 590 n. 7.

American Cyanamid next argues that the circuit court misapplied sec. 802.09(2), STATS., to the facts at hand. Section 802.09(2), STATS., provides:

> AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

American Cyanamid posits that Gorton Farms' request for attorney fees under sec. 100.18, STATS., was never tried by either express or implied consent and, therefore, the pleadings should not have been amended to include this claim. Gorton Farms counters that an amendment under sec. 802.09(2) was unnecessary because a claim for attorney fees was not part of the merits of the action to which fees pertain. Gorton Farms asserts in the alternative that even assuming an amendment of the pleadings was necessary, the circuit court acted within its discretion in amending the pleadings because an amendment was necessary to conform them to the evidence presented at trial.

American Cyanamid's protests notwithstanding, this case clearly deals with allegations that American Cyanamid engaged in false and misleading advertising resulting in pecuniary loss to the plaintiffs. These are exactly the type of allegations that fall within the purview of sec. 100.18(1), STATS. *See Grube v. Daun*, 173 Wis.2d 30, 57, 496 N.W.2d 106, 116 (Ct.App.1992) (noting that "Wisconsin Supreme Court and this court have made clear that the statute intends to protect the public from all untrue, deceptive or misleading representations made in sales promotions, including representations made in face-to-face sales where no media advertising is involved."). Gorton Farms' negligent misrepresentation claim, as presented by the evidence at trial, entailed all of the elements of a claim brought pursuant to sec. 100.18(1), STATS. Thus, the jury, as well as the circuit court judge, heard all of the evidence that it needed to render a decision regarding the sec. 100.18 claim. The jury returned a verdict that

American Cyanamid was negligent and that its conduct was outrageous.

We conclude that the circuit court properly exercised its discretion in determining that sec. 802.09(2), STATS., would allow Gorton Farms' post-trial request for attorney fees. American Cyanamid had ample opportunity to rebut the underlying allegations stemming from a sec. 100.18, STATS., claim, and in fact, presented substantial evidence at trial in an effort to rebut Gorton Farms' assertions on this point. As noted by the circuit court: "[T]he plaintiffs did in fact suffer pecuniary losses because of a violation of this section [sec. 100.18] and accordingly should be permitted reasonable attorney fees." Quite simply, it is disingenuous for American Cyanamid to presently assert that it had no idea that its statements relating to the sale of SCEPTER were to be at issue during trial.

In sum, although there is an argument that Gorton Farms should have pleaded a sec. 100.18, STATS., claim prior to or during trial, there is no dispute that the claim was fully aired at trial. Further, in asserting a claim for attorney fees post-trial, American Cyanamid was in no way prejudiced. *See State v. Peterson*, 104 Wis.2d 616, 312 N.W.2d 784 (1981); *Zobel v. Fenendael*, 127 Wis.2d 382, 379 N.W.2d 887 (Ct.App.1985). There simply was no other evidence that could have been presented during trial to rebut a sec. 100.18 claim vis a vis the claims that were already at issue based on the original and amended complaints.

By the court.—Order of the circuit court is affirmed.

APPENDIX B

STATE OF WISCONSIN: CIRCUIT COURT-
BRANCH 5: RACINE COUNTY:

JOHN L. GORTON,
THOMAS HAUCH,
TIMOTHY HAUCH and
MICHAEL VANDERLEESE,
partners under the name of
GORTON FARMS,

Plaintiffs,

vs.

AMERICAN CYANAMID
COMPANY,

Defendant.

TRANSCRIPT OF
HEARING

File No.
90-CV-1173

Proceedings held before the HONORABLE DENNIS J. BARRY, Circuit Judge-Branch 5, Racine County Courthouse, on July 29, 1993.

APPEARANCES:

Plaintiffs appearing by their attorney, Robert H. Bichler.

Defendant appearing by its attorney, Kenneth B. Ness.

Marjean Schlagenhaft, Court Reporter.

THE COURT: Okay. The first question that the Court has to answer is whether or not the plaintiff is entitled to the reasonable attorney fees under Section 100.18(11)(b)(2) under the facts of this case. We spent the better part of last August, 1992, from August 14 to August 31, litigating this case before the jury.

Prior to that, the record will show that there were numerous hearings regarding discovery, discovery problems, motions to compel and so forth that this Court heard. This, this case has been ongoing for a significant period of time with numerous court hearings.

But the issue, again, is whether or not Section 100.18 can be relied upon to allow the plaintiff to recover actual attorney fees in addition to the compensatory damages that the jury awarded in its first verdict, the punitive damages which the jury awarded in its second verdict, the additional cost, the regular statutory cost and the additional cost that this Court allowed subsequent or at a hearing subsequent to the jury's verdicts and now the reasonable attorney fees.

In answering that question, the Court has to look to the verdicts that were rendered, the evidence that was presented during the course of the trial and the particular statute. The Court is satisfied, based on the record, trial record in this case, that the plaintiffs did in fact suffer pecuniary losses because of a violation of this section and accordingly should be permitted reasonable attorney fees in addition to the other costs that have been awarded.

The reason for that I think is implicit in the questions that I asked Mr. Ness during his argument. Certainty I find no fault with his argument, but what I'm looking at and I, what I'm not satisfied about is the fact that this statute is a very broad statute. Now, and I think I indicated that much of the evidence that was presented during the course of the trial related to the literature which is in the form of the various exhibits that are part of the trial record which American Cyanamid presented to the public. The information that was disseminated clearly indicated that SCEPTER would not harm follow crops.

Based on the testimony and the evidence that was presented during the trial, I am satisfied, based on the only interpretation that a reasonable mind could place on the jury's verdict, was that the jury found that that in fact did occur, that there was untrue, deceptive and misleading information, certainly misleading information, deceptive information maybe to a lesser degree but untrue information that was contained in the literature that was disseminated by American Cyanamid.

The jury also found that that conduct was outrageous. Now Mr. Ness makes a good point in that it could be argued that part of the jury's outrageous finding was, included the fact that the product may have been rushed to market, that it should have undergone additional testing, but as I view it, all that would have done and all that goes to is that it would have provided information that may have made their untrue or misleading information that they published true. In other words, they would have been

able to cure the problem that in fact did exist when they published this information.

As it stood, however, there was no question, based on the evidence, that the information, certainly as it related to, I believe one of their claims was that there was only one incident of follow crop difficulty or damage, when in fact the figures showed much more than that.

Now we can get into exactly, and there was a debate about the percentages and so forth, and I'm not going to get into that now, but I'm satisfied that it was clear, based on the records of the company, based on the testimony of American Cyanamid's own people, that the information was misleading and untrue regarding the results of the follow crop studies. That was all before the jury.

Now that information clearly, I don't think there's any doubt that the literature that was published and disseminated by American Cyanamid related to its intent and desire to sell the product, and it published and disseminated the literature in the form of advertisements or other literature, that that was disseminated to the public to sell the merchandise or the product, and again, there were statements of fact, statements that were untrue and misleading.

Now the question is, did Mr. Gorton, or the plaintiff consortium of Gorton Farms, suffer pecuniary loss because of that violation. Again, I'm satisfied that the verdict, number one, and the evidence upon which that verdict was rendered, number two, the record that was made at trial, satisfies me that in fact because of the violations of 100.18(1) by

American Cyanamid, that the plaintiff is entitled to the reasonable attorney fees that this section permits.

I don't believe that the pleadings need to be amended. This is an element of cost. The issue that these costs are permitted for was litigated, was clearly the primary focal point of the trial, and so there is no surprise, there's no, at least as I see it, there is no legitimate argument that American Cyanamid didn't know, and I think that it's clear here, again reading that statute, that the statute does not call for an intent to deceive or intent to make an untrue statement.

If that were the case, then we would have a whole other issue. Certainly a jury would have to make that kind of a determination. That's not what the statute says. That's not what the statute requires, and I'm satisfied that what it does require was laid out before that jury for that two week period. They made their findings, and I'm satisfied that any reasonable inference and any reasonable interpretation of the verdict and the evidence supports a finding that the attorney fees are permitted.

I think from a policy standpoint, too, if you look at the statute, if you look at the case law that was cited by Mr. Bichler, that this is not an inappropriate finding. We have a large corporation. We have an individual who, or farm, but certainly in comparison, it's kind of a David and Goliath situation, and the record in this case, I think, is very replete with the difficulties that the plaintiff had with discovery.

Sometimes my court reporter and I shudder when we reminisce about this case and some of the many

lengthy hearings that we had about the problems with discovery, and while sometimes it may have opened a little bit of a smile, I can't help but recall the time that the Court did receive a phone call from Mr. Bichler at American Cyanamid, one of its offices on the East Coast, when the security person was there ready to throw him out of the office after this Court had directed that he be permitted to go and review the various documents that were there.

We talked about literally the nine yards of, I think it was 27 feet or nine yards of files that were located there that Mr. Bichler had to go through, I think some of which may have been over at your co-counsel's office, Mr. Ness, and others that may have been located out East.

I don't recall exactly where they were, but this was a very expansive case that required a great deal of discovery, travel to the location of the defendant and so forth and the defendant's office, and it seems that from a rational standpoint that attorney fees, actually attorney fees should also be included so that enforcement by individuals who perhaps have lesser sources than a national corporation is not thwarted.

In this case, I don't think that the amount of fees —and again, that may still be subject to some modification—but even if the Court were to allow the fees that are requested, if they can be established and if you have some evidence that there may not be some reasonable fees in here, that still is going to be open to your presenting the Court with your counter evidence, but the point is, it does not appear that that is an inordinate sum, even as requested in Mr. Bichler's affidavit, given what the Court has

firsthand observed of the difficulties in prosecuting this case.

Again, not just this case but that kind of, you know, it doesn't take a great deal of imagination to see how a large corporation can attempt to swamp an individual or someone of lesser resources in prosecuting a legitimate claim, and it's very clear by virtue of the jury's verdict, at least from my standpoint—and I realize this is going up on appeal—but from my standpoint, I'm satisfied that this was a legitimate claim.

So that concept of the individual being a private attorney, as I think is recited in one of the cases, I think is very applicable from a policy standpoint, as well as the facts of this case that I've already alluded to, so for that reason, the Court is satisfied that under the situation we have in this case, the plaintiff is entitled to reasonable attorney fees under Section 100.18(11)(b)(2). The only question that I see remaining, one of the primary questions that still remains is the reasonableness of the attorney fees.

MR. BICHLER: Can I address that, your Honor?

THE COURT: Sure.

MR. BICHLER: Okay.

THE COURT: Did you have a witness out here?

MR. NESS: Yes, I do, your Honor.

MR. BICHLER: If the Court's going to take testimony, we may want to bring in a counter witness.

THE COURT: We'll take a short recess then.

APPENDIX C

STATE OF WISCONSIN: CIRCUIT COURT:
RACINE COUNTY

JOHN L. GORTON,
THOMAS HAUCH,
TIMOTHY HAUCH and
MICHAEL VANDER LEEST,
partners under the name
GORTON FARMS, a Wisconsin
general partnership,

Plaintiff,

Case No.
90-CV-1173

v.

AMERICAN CYANAMID COMPANY,
a Maine corporation,

Defendant.

ORDER GRANTING ATTORNEYS FEES AND
FOR AMENDMENT OF JUDGMENT

Plaintiff filed a Petition for Attorneys Fees under 100.18, Wis. Stats.; the Court held an initial hearing on it on June 7, 1993; the parties were given full opportunity to submit briefs on the legal issues; a fur-

ther hearing was held on July 29, 1993, which was held in open court and on the record; after hearing the parties, the Court stated its decisions and the reasons for its decision orally on the record wherein it found that the plaintiffs were damaged by reason of defendant's untrue, deceptive or misleading statements with the meaning of Section 100.18 Wis. Stats. and by reason thereof plaintiffs are to be granted reasonable attorneys fees through April 13, 1993, in the amount of $307,421.25.

NOW, THEREFORE, IT IS ORDERED:

That the clerk shall forthwith enter an Amended Judgment in this case to include in the amended judgment "...and reasonable attorneys fees of $307,421.25, making the total judgment $507,306.49..."

Dated this 30th day of July, 1993.

BY THE COURT

/S/

Honorable Dennis J. Barry
Circuit Court Judge

APPENDIX D

STATE OF WISCONSIN: CIRCUIT COURT:
RACINE COUNTY

JOHN L. GORTON, THOMAS HAUCH, TIMOTHY HAUCH and MICHAEL VANDER LEEST, partners under the name GORTON FARMS, a Wisconsin general partnership,	)	AMENDED JUDGMENT
Plaintiff,	)	Case No. 90-CV-1173
v.	)	
AMERICAN CYANAMID COMPANY, a Maine corporation,	)	
Defendant.	)	

The Court having directed the entry of judgment in this action on motion before the Court held on October 16, 1992 and the Court having further entered an Order for Amendment of the Judgment by Order dated July 30, 1993,

IT IS ADJUDGED:

That plaintiffs John L. Gorton, Thomas Hauch, Timothy Hauch and Michael Vander Leest, partners under the name Gorton Farms, have and recover of the defendant, American Cyanamid Company the principal sum of $179,300.00, plus double costs taxed and allowed in the amount of $20,585.24 and reasonable attorneys fees of $307,421.25, making the total judgment $507,306.49 and 12% interest on the total judgment from August 28, 1990, to the date judgment is satisfied.

Name of defendant: American Cyanamid Company
Address of defendant: One Cyanamid Plaza
Wayne, New Jersey 07471

Dated this 30th day of July, 1993.

BY THE COURT:

/S/

Dep. Clerk of Court

Supreme Court, U.S.
FILED
NOV 28 1995
CLERK

No. 95-669

In The

Supreme Court of the United States

October Term, 1995

AMERICAN CYANAMID COMPANY,

Petitioner,

vs.

JOHN L. GORTON, THOMAS HAUCH, TIMOTHY HAUCH AND MICHAEL VANDER LEEST, PARTNERS UNDER THE NAME GORTON FARMS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

RESPONDENTS' BRIEF IN OPPOSITION

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JOANNE M. BREESE-JAECK
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17 pp

QUESTIONS PRESENTED

I. Is this petition timely and within the jurisdiction of the Court since it does not raise the federal issue (federal preemption) upon which the petition (and presumably the order) for extension of time was based? (If technically within the Court's jurisdiction should the petition be summarily denied because there was a lack of candor employed in obtaining an extension of time and an expansion of the jurisdiction of this Court?)

II. Can petitioner raise in this court questions regarding the Seventh Amendment's guarantee of a jury trial and regarding the Fourteenth Amendment's Due Process Clause which questions were neither raised nor passed upon in any court below?

III. Is there a constitutional right to a jury trial regarding an issue of costs to be awarded to the prevailing party in litigation or regarding a factual issue which a court finds has been established as a matter of law and regarding which a jury rendered a verdict?

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II. The petition must be denied because it raises in this Court questions regarding the Seventh Amendment's guarantee of a jury and regarding the Fourteenth Amendment's Due Process Clause which questions were neither raised nor passed upon in any court below.	7
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STATEMENT OF JURISDICTION

Respondents contend that this petition is not timely, and, therefore, is not within the jurisdiction of this court. The application for extension of time (and presumably the order which extended the time) had but one federal issue as its basis, which was whether the Wisconsin Supreme Court erred regarding federal preemption.

In its petition for an extension of time Cyanamid stated its purpose: "The state supreme court's ruling that FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. sec. 136-136y (1994)) does not preempt state law damage claims based on advertising and promotional representations that are completely consistent with a pesticide's EPA-approved labeling directly conflict with opinions of a least two federal courts of appeals."

Since the application for extension of time was based on whether Wisconsin erred regarding federal preemption, presumably the order extending time is limited to a petition for certiorari which raises federal preemption. This petition for certiorari does not seek review of the federal preemption issue. Rather, the petition attempts to raise (for the first time) totally new alleged federal issues. This petition is not timely. It is not within the jurisdiction of this Court.

(If we assume for purposes of argument only that Cyanamid's petition is technically within the jurisdiction of this Court, then the jurisdiction was obtained through a lack of candor with the court. In asking for more time, Cyanamid stated that it needed more time to assess whether it would petition to be heard regarding federal preemption. However, the petition which was filed does not seek review of that issue. At best, any claim to this Court's jurisdiction was obtained through use of lack of candor

with the Court. Under these circumstances, the Court should summarily deny this petition. To do anything less would appear to condone being less than totally candid with this Court.)

STATEMENT OF THE CASE

The record on appeal does not include a complete transcript of the trial court proceedings. Not all of the evidence admitted at trial is in the appellate record. The exhibits admitted at trial are not part of the appellate record. The positions of trial counsel regarding jury instructions and requested verdict are not part of the appellate record. In Wisconsin it is the appellant's responsibility to assure the record is complete. Where the record is incomplete, it is assumed that the missing material supports the trial court's ruling. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W. 2d 226 (Ct. App. 1993). In assessing this petition, this Court must assume, as did the Wisconsin Supreme Court, that the missing materials support the trial court rulings.

Some of the statements made in the petition are false and others are misleading. Neither attorney who has taken part in the preparation of the petition took part in this litigation while it was in the trial court. The fact that no complete transcript of the trial court proceedings has ever been prepared may provide an explanation for the false and misleading assertions in the petition. Under this Court's rules it is incumbent on respondents to address any perceived misstatement of fact or law in the petition.

False and misleading is the statement made at page 5 of the petition: "The trial centered on the tests conducted by Cyanamid to determine a safe waiting period for planting rotational corn in soybean fields that had been treated with Scepter."

The truth is that the trial centered on what Cyanamid reported to farmers about the alleged safety of Scepter to follow

corn and what Cyanamid knew about Scepter's danger to follow corn. The internal records of Cyanamid showed that Scepter frequently damaged follow corn. In spite of having such information Cyanamid advertised Scepter as extremely safe to follow corn. In its advertising Cyanamid stated that field tests showed only one case of follow corn response to Scepter. Yet, Cyanamid's internal records documented many reports of corn response due to Scepter carryover. In fact, Cyanamid's documents showed that approximately 29% of tests showed Scepter carryover to follow corn.

The partial quotation in the first paragraph on page 6 of the petition tends to be misleading. As partially quoted, a reader gets the impression that in Wis. Stat. § 100.18 reasonable attorney fees are part of the pecuniary loss, *i.e.*, the damage element of the cause of action. The statute clearly states that reasonable attorney fees are part of "costs" allowed to the successful litigant. In the context of this petition (in which rights to a jury trial and rights to due process have been made) a clear distinction between what is the damage element of a cause of action verses what is an element of "costs" recoverable by a successful litigant is essential to the analysis. At best the partial quote made in the first paragraph appears designed to mislead.

Also, potentially misleading is the assertion made at the bottom of page 8 and the top of page 9 where the implication is that in the Wisconsin Supreme Court, Cyanamid claimed a deprivation of due process. In the Wisconsin Supreme Court Cyanamid did not make any such argument. The Wisconsin Supreme Court did not address or decide any such issue. *A fortiori* no argument was made nor did the Wisconsin Supreme Court address the due process requirements of the Fourteenth Amendment.

Cyanamid's petition for the first time raises issues under the

Seventh and the Fourteenth Amendments of the United States Constitution. In the more than six year course of this litigation at no time before this petition for certiorari did Cyanamid ever press any Seventh or Fourteenth Amendment issues. Similarly, no court below ever addressed or decided any issues relating to the Seventh Amendment or relating to the Fourteenth Amendment. While it is true that Cyanamid did argue that it was entitled to have a jury decide whether it had violated § 100.18 of the Wisconsin Statutes, Cyanamid never argued nor did any court below ever address whether any rights under the Seventh or the Fourteenth Amendments of the United States Constitution were involved in this case.

REASONS FOR DENYING THE WRIT

I.

THIS PETITION IS NOT TIMELY AND NOT WITHIN THE JURISDICTION OF THE COURT SINCE IT DOES NOT RAISE THE FEDERAL ISSUE (FEDERAL PREEMPTION) UPON WHICH THE PETITION (AND PRESUMABLY THE ORDER) FOR EXTENSION OF TIME WAS BASED. (IF TECHNICALLY WITHIN THIS COURT'S JURISDICTION THIS PETITION SHOULD BE SUMMARILY DENIED BECAUSE OF LACK OF CANDOR EMPLOYED IN OBTAINING AN EXTENSION OF TIME AND AN EXPANSION OF THE JURISDICTION OF THIS COURT.)

"Title § 2101(c) [28 USC § 2101(c)] requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). In keeping with this mandate, the Supreme Court has directed that the clerk will not file any petition for a writ of certiorari that is

jurisdictionally out of time. Sup. Ct. R. 13(2). This rule is designed to keep the clerk from filing cases over which the Court does not have jurisdiction. This case was filed because on the face of the record it appears to be timely, but in reality it is not timely.

The Wisconsin Supreme Court issued its decision in this matter on June 26, 1995. On September 8, 1995, Cyanamid filed an application to extend the time for applying for a writ of certiorari. Cyanamid's request was made pursuant to Rule 13(5) of the Rules of the Supreme Court of the United States, which require that "[a]n application to extend the time to file shall set out the basis for jurisdiction in this Court . . . and set out specific reasons why an extension of time is justified . . . ."

Cyanamid's application generally states that the grounds for jurisdiction lie in 28 U.S.C. § 1257(a) (1988). This assertion is elaborated upon in the Statement of the Reasons Why an Extension of Time Is Justified. Specifically, Cyanamid argues that the "state supreme court's ruling that FIFRA does not preempt state law damages claims based on advertising and promotional representations that are completely consistent with a pesticide's EPA-approved labeling directly conflicts with opinions of at least two federal courts of appeals."

Nowhere in the entire application did Cyanamid either state or imply that its requested extension was related in any way to Seventh or Fourteenth Amendment questions. Instead, every aspect of Cyanamid's application confirms that the sole issue for which an extension had been requested was that of FIFRA preemption.

The alleged conflict between the Wisconsin Supreme Court's decision and the opinions of two federal courts of appeals is completely unrelated to the issues now set forth. Similarly,

"[t]his Court's disposition of the certiorari petition in [*Jenkins v. Amchem Products, Inc.*, 886 P.2d 869 (Kan. 1994), *petition for cert. filed*, 63 U.S.L.W. 3908 (U.S. June 16, 1995) (No. 94-2061)]" has nothing to do with the Seventh and Fourteenth Amendment questions asserted in Cyanamid's petition.[1]

In short, Cyanamid failed to preserve the issues now raised by its Application to Extend Time since that application is limited to issues of FIFRA preemption. Its present petition was not filed within the ninety days which are statutorily allowed. *See* 28 U.S.C.S. § 2101(c) (1988). Therefore, Cyanamid's petition is jurisdictionally out of time, and this petition should be dismissed as not within the Court's jurisdiction.

By the time that Cyanamid requested an extension of time, its counsel had to know what issues might be raised with this Court. Thereafter, Cyanamid wisely chose not to raise the federal preemption issue. On its face the Wisconsin Supreme Court decision demonstrates that there can be no arguable merit to an assertion that FIFRA preempts claims based on fraudulent misrepresentation. From the perspective of these respondents, who to this day have not been paid for their 1988 and 1989 crop losses and who have had to endure years of litigation, this petition appears to be yet another use and manipulation by Cyanamid of

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1. Additionally, the fact that Cyanamid had hired a new in-house attorney shortly before the Wisconsin Supreme Court's opinion was rendered is clearly an insufficient basis upon which to request an extension. *See Kleem v. Immigration & Nat. Serv.*, 479 U.S. 1308 (1986) (Stating that requests for extensions of time "are not favored," and that the "good cause shown" standard was not met by a desire for additional time to research constitutional issues because the same reason could be adduced in virtually all cases.") Therefore, even if this stated reason could be inferentially extended to include constitutional issues, it would not have been sufficient grounds upon which to grant the extension. Consequently, Cyanamid would have been required to file its petition in a timely manner even if it had actually requested an extension.

the courts to achieve delay and thereby to further burden those victims of Cyanamid's wrongdoing who resort to the courts to seek redress based on Cyanamid's wrongdoings.

II.

THE PETITION MUST BE DENIED BECAUSE IT RAISES IN THIS COURT QUESTIONS REGARDING THE SEVENTH AMENDMENT'S GUARANTEE OF A JURY AND REGARDING THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE WHICH QUESTIONS WERE NEITHER RAISED NOR PASSED UPON IN ANY COURT BELOW.

In the more than six year course of the litigation at no time before this petition for certiorari did Cyanamid ever raise (nor did any court ever rule upon) any of the questions presented by Cyanamid in its Petition for a Writ of Certiorari. The questions presented and the arguments made in the petition for certiorari to this Court were not presented by Cyanamid in the trial court. They were not ruled upon by the trial court. Those questions and arguments were not presented to the Wisconsin Supreme Court. They were not passed upon by the Wisconsin Supreme Court. While it is true that Cyanamid did argue that a jury should have determined whether there was a violation of § 100.18 of the Wisconsin Statutes, Cyanamid never argued and no court ever addressed whether the Seventh Amendment's guarantee of a jury trial bore on the issue. Neither was it ever argued nor did any court below pass on whether the Fourteenth Amendment's Due Process Clause in any way related to the assessment of fees.

It is the practice of this Court when reviewing decisions by state courts not to decide federal claims that were not "pressed or passed upon" below. *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 79-80 (1988); *Clark v Jeter,* 486 U.S. 456 (1988).

"In reviewing the judgments of state courts under the jurisdictional grant of 28 USC sec. 1257, the Court has, with very rare exception, refused to consider petitioners' claims that were not raised or addressed below." *Illinois v Gates*, 463 U.S. 213, 218-220 (1983); *Yee v. Escondido*, 503 U.S. 519, 521 (1992).

Since none of the issues which are presented to this Court for consideration by Cyanamid's petition for a writ of certiorari were either pressed or passed upon in any court below, this petition must be denied.

III.

THERE IS NO CONSTITUTIONAL RIGHT TO A JURY TRIAL REGARDING AN ISSUE OF COSTS TO BE AWARDED TO THE PREVAILING PARTY IN LITIGATION NOR REGARDING A FACTUAL ISSUE WHICH A COURT FINDS HAS BEEN ESTABLISHED AS A MATTER OF LAW AND REGARDING WHICH THE JURY RENDERED A VERDICT.

All of the issues raised in Cyanamid's petition center upon the assertion that the company was somehow deprived of its right to a jury trial when the trial court assessed attorney's fees pursuant to Wis. Stat. § 100.18(11)(b)(2). Section 100.18(11)(b)(2) of the Wisconsin Statutes provides in pertinent part that:

> Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including attorney fees.

It has long been recognized that an award of attorneys' fees

is "'uniquely separable from the cause of action' that is settled by a court's judgment on the merits." *FCC v. League of Women Voters of California,* 468 U.S. 364, 375 n. 10 (1984) (citation omitted). This recognition flows from the fact that attorneys' fees are a form of costs. *See Hutto v. Finney,* 437 U.S. 678, 697 n. 28 (1978) (Stating that some federal statutes define attorneys' fees as an element of costs, while others separate fees from other taxable costs); *see also, Alyeska Pipeline Serv. v. Wilderness Soc.,* 421 U.S. 240, 250 (1975) (Explaining that, historically, federal courts referred to the state rules governing awards of counsel fees, but that in 1842, Congress gave the Supreme Court authority to prescribe the items and amounts of costs which could be taxed in federal courts). Thus, in stating that it was denied the right to a jury trial on the award of attorneys' fees, Cyanamid is really asserting that juries, rather than courts, must award costs.

This clearly cannot be the case. At common law, costs (including attorneys' fees) were not an available form of relief. *See Alyeska,* 421 U.S. at 247. Federal and state legislatures have defined those instances in which fee awards are available through statutory enactments. *See id.* at 240-263. Furthermore, attorneys fees have been recognized as falling within the historic equity jurisdiction of federal courts. *Sprague v. Ticonic National Bank,* 307 U.S. 161, 164 (1939).

The Seventh Amendment's guaranteed right to a jury trial does not encompass rights and remedies in equity. Rather, it is limited to common law actions in which *legal* rights are being ascertained. *See Curtis v. Loether,* 415 U. S. 189, 193 (1974).

There is no question that attorneys' fees fall outside of this definition. Consequently, it is completely meritless to assert that any Seventh Amendment violation could have occurred in this case. The trial court acted within its recognized scope of authority (and, in fact, followed its statutory mandate) by awarding fees to

the plaintiffs who had been harmed by Cyanamid's violation of Wis. Stat. § 100.18.

Furthermore, Cyanamid cannot argue that it was somehow deprived of a jury trial with respect to the determination of whether an underlying violation of Wis. Stat. § 100.18 had occurred to mandate a fee award. Throughout the two week trial in this case, Gorton Farms litigated their belief that misleading and deceptive information had been disseminated to them regarding Scepter. (Petitioner's App. B at 2b-5b). The jury heard a multitude of evidence, and entered a verdict finding negligence.

As stated by the trial court, the only reasonable interpretation of this verdict is that the jury did find that the information disseminated by Cyanamid was deceptive and misleading. (Petitioner's App. B at 4b). This constitutes a violation of Wis. Stat § 100.18. Because the verdict necessarily included a conclusion that Wis. Stat § 100.18 had been breached, Cyanamid did, in fact, receive a jury trial with respect to the underlying violation.

Moreover, even if the jury's verdict had not disposed of the underlying violation, the trial court was entitled to, and did, find noncompliance with § 100.18 as a matter of law. (Petitioner's App. B at 4b). The power of courts to rule as a matter of law has been accepted for well over a century. *See Galloway v. United States of America,* 319 U.S. 372, 389-90 (1943) (Stating that the contention that federal courts are constitutionally precluded from directing a verdict had been foreclosed for nearly a century as of 1943, and that the jury was not absolute master of fact in 1791).

In this case, undisputed evidence of misrepresentations was submitted for consideration. In assessing fees, the trial court found and counsel for Cyanamid admitted that the false and misleading information had been disseminated with the intent to

sell Scepter. This uncontroverted evidence constituted a violation of Wis. Stat § 100.18. (Petitioner's App. B at 2b-5b).

It was within the trial court's authority and was the trial court's duty to rule as a matter of law based upon the undisputed facts that a violation of § 100.18 of the Wisconsin Statutes had occurred. As shown by the analysis contained in *Galloway*, a trial court which so acts within its authority and which so performs its duty does not violate the Seventh Amendment. *See* 319 U.S. at 389-90.

CONCLUSION

The petition for certiorari should be dismissed because it is not within the jurisdiction of the Court. If it is within the jurisdiction, it should be denied both because the issues now raised were not pressed or passed on by any court below and because those issues are without factual basis and without legal merit.

Respectfully submitted,

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